United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Original - Affidavit of Mailing

74-1446

To be argued by
PAUL B. BERGMAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1446

UNITED STATES OF AMERICA,
Appellant,

—against—

BERNHARD FEIN,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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Preliminary Statement

The Government appeals, pursuant to Title 18, United States Code, Section 3731, from an order of the United States District Court, Eastern District of New York (Dooling, *J.*) dated January 29, 1974, dismissing a two count indictment charging the defendant-appellee, Bernhard Fein, with the corrupt receipt of a bribe in violation of Title 18, United States Code, Section 201(c)(1), and with a false declaration before a Federal Grand Jury in violation of Title 18, United States Code, Section 1623.

The District Court dismissed the indictment on the ground that the grand jury which indicted appellee had been sitting in excess of the 18 month limitation contained in Rule 6(g) of the Federal Rules of Criminal Procedure at the time that the true bill against appellee was returned.*

* The decision of the District Court, dated January 29, 1974, as well as its decision denying the Government's motion for reargument, dated February 13, 1974, are contained in the Government's Appendix at pages A-62-A-69 and A-71-A-72, respectively.

Statement of the Case

On March 17, 1971, by order of District Judge George Rosling, a special 18 month grand jury was convened in the United States District Court for the Eastern District of New York "pursuant to Rule 6(a) and (g), Federal Rules of Criminal Procedure" (see Order for a Special Grand Jury, dated March 11, 1971, Government's Appendix, p. A-81). On August 30, 1972, in the eighteenth month of that grand jury's tenure, it was extended by Chief Judge Mishler for an additional six months "for the purpose of completing the business of the said Special Grand Jury." That order of extension was based upon Section 3331 of Title 18, United States Code (see Order, dated August 30, 1972, Government's Appendix, p. A-82). Thereafter, on September 26, 1972, within the extended term, the grand jury indicted appellee. Subsequent indictments followed and on February 2, 1973, Chief Judge Mishler extended the tenure of the Special Grand Jury for an additional six months for the same purpose and again pursuant to Title 18, U.S.C., Section 3331 (see Order, dated February 2, 1973, Government's Appendix, p. A-83).

During that second extended term of the special grand jury, it returned an indictment in the case of *United States* v. *McDonnell and Fetell,* 73 Cr. 562 (E.D.N.Y.). Subsequently, Fetell moved before Judge Jack B. Weinstein, the District Judge to whom that case had been assigned, for dismissal of the indictment upon the ground that the special grand jury had been unlawfully extended beyond its initial 18 month tenure. In opposition, the Government submitted an affidavit of Assistant United States Attorney Anthony T. Accetta which described the nature of the special grand jury's investigations and the circumstances surrounding the two extensions. The motion in the *McDonnell* case was heard by Judge Weinstein on November 21, 1973 and was denied. (See Transcript of November 21, 1973 hearing before Hon. Jack Weinstein, Government's Appendix, pp. A-47-A-61.)

Following the decision in the *McDonnell* case, appellee moved before Judge Dooling for the same relief and upon the same grounds as had previously been asserted in the *McDonnell* case (see Notice of Motion and Affidavit, dated December 20, 1973, Government's Appendix, pp. A-6-A-17). Among other exhibits attached in support of the motion, was a copy of the Accetta affidavit filed in the *McDonnell* case (Government's Appendix, pp. A-28-A-34).

The affidavit of Assistant United States Attorney Accetta provided as follows:

> Anthony T. Accetta, being duly sworn, deposes and says: That he is an Assistant United States Attorney, on the staff of Robert A. Morse, United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such.
>
> This affidavit sets forth a history of the March 17, 1971 Grand Jury proceedings resulting in the indictment of Henry Fetell and others.
>
> In approximately October of 1970, shortly after joining the office of the United States Attorney for the Eastern District of New York, I was asked to assist another Assistant United States Attorney in the preparation of a case against a real estate broker who had allegedly committed acts of fraud in obtaining loans insured by the Federal Housing Administration ("Case One"). I was told by both the United States Attorney and the Chief Assistant United States Attorney that there appeared to be violations of federal law with respect to the Federal Housing Administration and that I was assigned to investigate that area.
>
> Shortly after receiving the assignment to work generally on "F.H.A." and specifically on Case One, I attended hearings held by New York State Senator

Ralph Marino concerning abuses in the real estate industry. This had nothing to do with Case One, but the particular abuses, as testified to by a significant number of witnesses, suggested the possibility of widespread fraud. This impression was confirmed through contact I had with Patrick Cea, Esq., Associate Attorney of the Department of State, Division of Licenses, who specialized in the regulation of licensed real estate brokers. I learned from him that the broker in Case One had very extensive dealings with a particular private mortgage lending company ("mortgagee") and that numerous instances of false documents being submitted to the Federal Housing Administration could be proven against the broker. This information increased my interest in the broker in Case One. The entire responsibility for that case was given to me in approximately January or February of 1971.

During the period of October, 1970 and through approximately January, 1972 (and in some respects even later) my responsibilities as an Assistant United States Attorney were not restricted to what became known as the "FHA Investigation," but rather included all of the various matters a non-specialized Assistant United States Attorney is called upon to handle. As a result, Case One, being an investigation rather than a matter currently in Court, did not have priority in my personal schedule. For several months the only activity in the case was an F.B.I. field investigation of various mortgagors who dealt with the broker in Case One. When that was completed I began the process of personally interviewing mortgagors and reviewing their applications to determine the source of false statements contained therein. From approximately April of 1971 until approximately August of 1971 the investigation was centered on the real estate broker in Case One, with

some interest in the mortgagee through whom the broker obtained loans. While no Grand Jury inquiry was begun at that time, it was my intention to seek an indictment against the broker in a regular monthly Grand Jury if cooperation from that broker could not be obtained. In approximately August of 1971 the Government, for the first time, received significant information and documentation which indicated that what had been mere rumor and suspicion had an apparent basis in fact. At that point Case One expanded from one real estate broker and 20-30 mortgagors involving the general subject matter of submitting false statements to the F.H.A., to Case Two, which involved the additional crimes of conspiracy and bribery. The possible scope of defendants increased from one broker to a mortgage company and at least five of its principals, operatives or employees as well as to several Government officials employed by the Federal Housing Administration.

During the month of August, 1971, realizing the possibility of a broader investigation, I discussed the need to present extensive testimony to a Grand Jury with, to the best of my recollection, Edward J. Boyd and Robert A. Morse, who was then acting United States Attorney. It was decided to present the case to a Special Grand Jury, and I was advised by Mr. Boyd that there was a Special Grand Jury impanelled in March of 1971 for the Anti-Trust Division of the Justice Department; that it would be proper to use that Grand Jury to present the case; and that by using the Special Grand Jury I would not be rushed in presenting the case to the Grand Jury nor lose testimony already before a monthly Grand Jury when its term expired.

The Grand Jury began hearing testimony relating to cases One and Two in early September, 1971. The Grand Jury was not due to expire until September

of 1972 and I anticipated that the case would be over long before that time. In late September of 1971 the United States Attorney announced that an investigation into mortgage fraud would be conducted and he appealed to the public for information which would be of assistance to that investigation. The result of that appeal and of continued investigation by the Federal Bureau of Investigation was not only a number of complaints from the general public, which required investigation, but also the discovery of significant criminal activity involving bribery, fraud and conspiracy on the part of several additional real estate brokers who offered substantial cooperation to the Government. This cooperation led to the establishment of cases Three and Four which overlapped with cases One and Two. By late Fall of 1971, the number of potential defendants, including mortgagees, employees and principals, and Government officials increased dramatically.

During the period of time between the Fall of 1971 and the Winter of 1972 the Grand Jury began to learn of the intricacies of the real estate industry, the structure of the F.H.A., and the activities of real estate brokers, private lending institutions, and secondary markets. In addition, in approximately early January, 1972, a second major breakthrough was made with respect to evidence of bribery in the F.H.A. on a scale that had previously been unimagined. This information, alone, doubled the number of potential defendants and, more importantly, disclosed for the first time the existence of wide-ranging conspiracies involving large numbers of individuals in the real estate industry. This information led to cases Five through Sixteen.

At about the same time, the Fall and Winter of 1971-1972, there was an investigation by the United States Senate Anti-Trust and Monopoly Subcommit-

tee into the general area of mortgage fraud in Federal Housing Administration programs, as well as an inquiry into the role of primary and secondary financial institutions engaged in the mortgage business. Investigations and hearings held by this Subcommittee in May, 1972 as well as the results of the Grand Jury investigation itself provided the material for further investigation which ultimately led to cases 17-25.

In November, 1971, the Grand Jury handed down its first indictment, involving a man whose activities had been brought to light during Senator Marino's hearings, alluded to earlier. In March, 1972, the Grand Jury returned its first major indictments when 40 individuals and 10 corporations were indicted for conspiracy, bribery, and the submission of false statements to the Federal Housing Administration. In May, 1972 these indictments were superceded by the same Grand Jury, the only differences being matters of legal form rather than factual substance.

At that time it was becoming apparent that the extent of corruption in the F.H.A. and in the real estate industry in general went far beyond that alleged in the March indictments. It was also becoming apparent that, because of the Grand Jury investigation prior to March of 1972, things had supposedly "cooled down" at the F.H.A., and it further began to appear that some individuals had begun to do business with the Veterans Administration, which had not yet been investigated. Prior to March of 1972 some brief testimony had been taken with respect to illegal activities at the Veterans Administration, but, due to priorities, this line of inquiry was not pursued. However, informants advised that the effects of the March indictments were wearing off, and by June of 1972 I had information that it was

apparently "business as usual" at the Veterans Administration with respect to the bribery of Government officials.

During June or July, 1972, information which had first come to my attention on or about March 4, 1972 resulted in significant new developments. This led to the issuance of a Grand Jury subpoena in mid-July, 1972, some two months prior to the date the Grand Jury was due to expire. As a result, proof of bribery at the highest level of the F.H.A. office emerged. This evidence corroborated other proof that had already been presented to the Grand Jury. Shortly thereafter, within a month of the date on which the Grand Jury's original term was to expire, another breakthrough caused the Grand Jury to discover new crimes requiring further investigation. The foundation for this inquiry was the evidence the Grand Jury had been hearing since its inception. On or about August 30, 1972 I orally applied to Chief Judge Mishler for an extension of the March, 1971 Grand Jury on the ground that its investigation had expanded to such an extent that it could not be completed before it was due to expire. I further stated, in words or in substance, that to re-educate another Grand Jury as to what had already transpired would be unduly burdensome. I expressed the hope that the Grand Jury could finish its work before the end of its extended term. Judge Mishler wished to know if the Grand Jury concurred in the extension and I informed him (from personal knowledge) that it did. Judge Mishler asked me to submit an Order, and I did so pursuant to Title 18, Section 3331.

During the period between August and September, 1972, there became available, for the first time, concrete evidence of payments to officials employed by the Veterans Administration. During the period of the first extension virtually every Government offi-

cial accused of criminal conduct, many of whose names had been mentioned throughout the investigation, appeared before the Grand Jury.

In September of 1972 the Grand Jury issued a second round of indictments resulting from investigations conducted prior to the original expiration date. It then set about completing action on other matters, including an indictment in Case Three on which some evidence had first been presented in approximately October, 1971.

Between September 17, 1972 and February 2, 1973 (the date of the second extension Order), the Government became aware of proof of violations of the income tax laws involving persons who had been the subject of testimony during much of the course of the investigation. On or about February 2, 1973 I orally advised Chief Judge Mishler of these developments and that other pending matters required further action, and requested another extension. I further advised Chief Judge Mishler that the Grand Jury concurred in this request and on February 2, 1973 a second extension Order under Title 18, Section 3331 was signed by him.

The Grand Jury continued its work, including the return of indictment 73 CR 562 on June 6, 1973. On September 17, 1973 it was terminated by order of Judge Jack B. Weinstein.[*]

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* Several of the indictments returned by the March, 1971 special grand jury have reached this Court, either by way of appeal or as the subject of petitions for writs of mandamus. They are: *United States* v. *Berlin*, 472 F.2d 1002 (2d Cir.), *cert. denied*, 412 U.S. 949 (1973); and *United States* v. *Bernstein, et al.*, 72 CR 587 through 72 CR 599 (E.D.N.Y.), a case which has been on trial for the past seven months before Judge Travia, and which has been the subject of several petitions for mandamus under docket numbers 73-1591, 73-2429, 73-2251, 73-2477, 73-2478, and 74-1456.

Issue Presented

Was the indictment properly dismissed by the District Court?

ARGUMENT

The District Court erred in dismissing the indictment.

The District Court's decision dismissing the indictment against appellee was predicated on the language in Rule 6(g) of the Federal Rules of Criminal Procedure providing that: "A grand jury shall serve until discharged by the Court but no grand jury may serve more than 18 months." Having found that the grand jury which indicted appellee had been impaneled on March 17, 1971, the District Court concluded that the true bill against appellee, which was found on September 26, 1972—nine days following the 18 month period—was a legal nullity depriving the court of jurisdiction to hear the case. That conclusion was reached despite the fact that the grand jury had, theretofore, been extensively engaged for over a year in the investigation of a wide ranging pattern of frauds upon the Federal Housing Administration and Veterans Administration; despite the fact that the appellee had emerged as one of the targets of that investigation; despite the fact that Chief Judge Jacob Mishler had, on August 30, 1972, expressly ordered a six month extension of the grand jury's term, having found that the extension was necessary to enable the grand jury to complete its business; and, finally, despite the fact that appellee has never asserted nor in fact suffered any prejudice by reason of the Court ordered extension.

The District Court's decision seems to have treated the central issue of the case, the validity of the indictment, upon two separate grounds, both of which concerned the propriety of Chief Judge Mishler's order extending the term of the

grand jury. Initially considering the order as purporting to extend the grand jury's term pursuant to the grand jury provisions of the Organized Crime Control Act of 1970 (Title 18, U.S.C., § 3331, *et seq.*), the District Court was of the opinion that because "a Section 3331(a) Grand Jury was already sitting, conversion of the March 1971 Grand Jury [from a Rule 6 Grand Jury], into a Section 3332(b) Special Grand Jury, if possible at all, would have required the special determination of Section 3332(b), and that was not made" (See Memorandum and Order of the District Court, dated January 29, 1974, Government's Appendix, p. A-65). Having thus concluded that the extension provisions of Section 3331 did not apply, the District Court next considered the order of extension within the confines of Rule 6, F.R.C.P. Relying on the language in several past authorities which spoke of the grand jury as a "creature of statute" and which also declared that there was no *de facto* grand jury doctrine in the Federal Courts, the District Court concluded that the 18 month limitation in Rule 6(g) nullified the order of extension and doomed the indictment.

The Government's contention is that the District Court's decision does not take account of the dominant trend of the applicable precedents as well as the Congressional intent. The apparent major premise of the District Court's decision, that a grand jury is a "creature of statute," is simply not so. On the contrary, a grand jury is essentially a creature of the court intended to aid the court in the exercise of its jurisdiction over criminal cases. Indeed, the entire trend of Congress' sparse legislation concerning grand juries has been to either confirm or widen, when necessary, the District Court's flexibility in administering grand juries. As such, the courts have consistently held that an irregularity in the organization of a grand jury does not affect the validity of indictments which, in all other respects, properly confer jurisdiction in the court. In those cases where the courts have not slipped into the mistaken belief that grand juries are legislatively created, the courts have not found a Con-

gressional intent to hinder the courts and much less, an intent by Congress to affect, by its directions, the validity of indictments. The terminology of these cases is varied. Thus, some of the cases speak of implied powers, some speak of *de facto* grand juries, while others characterize Congressional legislation as directory, and not mandatory. The core of all the cases, however, is the recognition that irregularities of the kind involved in this case do not taint the essential function of the grand jury.

Framed against such a background, it does not seem helpful, as a matter of either policy or analysis, to treat Rule 6 and the grand jury provisions in the Organized Crime Control Act as distinct sources of law, as the District Court has done. Plainly, though the grand jury provisions in the 1970 Organized Crime Control Act are in one sense specialized, they are still no more than an adjunct to the District Court's general jurisdiction, confirmed in Rule 6, over grand juries. So viewed, it is incomprehensible to conceive that Chief Judge Mishler could not, at the very least, have ordered the extension under the extension provisions of Title 18, U.S.C., Section 3331(a). It is equally incomprehensible to conceive that, operating under such an order, even if irregular, the grand jury could not have brought forth a true bill against appellee.

1. The fallacy that grand juries are a "creature of statute"

The holding of the District Court that the indictment against appellee was a nullity is ultimately based upon the premise, cited in *In Re Mills,* 135 U.S. 263, 267 (1890), that "Grand Juries are a creature of statute" (Government's Appendix, p. A-66). It appears to be no coincidence that the only other federal decisions which have reached holdings analogous to that of the District Court, *i.e., United States* v. *Johnson,* 123 F.2d 111, 119-121 (7th Cir. 1971), *rev'd,* 319 U.S. 503 (1943); *Evaporated Milk Ass'n.*

v. *Roche,* 130 F.2d 843, 846 (9th Cir. 1942), *rev'd on other grounds,* 319 U.S. 21 (1943); and *United States* v. *McKay,* 45 F. Supp. 1007, 1013-1015 (D.C. Mich. 1942), seem to have based their holdings, as well, upon an assumed interpretation of the following language in the *Mills* case:

> "A grand jury, by which presentments or indictments may be made for offences against the United States, is a creature of statute. It cannot be empanelled by a court of the United States by virtue simply of its organization as a judicial tribunal." (135 U.S. at 267).

No doubt, a reading simply of that statement in the *Mills* case leads, nearly inexorably, to the conclusion reached by the District Court, for at the very least, it encysts the language in Rule 6(g), as well as the grand jury provisions in Title 18, U.S.C., § 3331 *et seq.,* within a jurisdictional mold. Yet, it is doubtful that the *Mills* case ought to be considered as fairly intending the meaning assigned to it and more certainly doubtful that the *Mills* case is correct if it intended to preordain that all Congressional legislation dealing with grand juries would carry jurisdictional overtones.

Sitting as a Circuit Judge in 1809, Justice Marshall in the case of *United States* v. *Hill,* 26 F. Cases 315, 317 (No. 15,364, C.C. Va.) made the following observations concerning grand juries:

> It has been justly observed, that no act of congress directs grand juries, or defines their powers. By what authority, then, are they summoned, and whence do they derive their powers? The answer is, that the laws of the United States have erected courts which are invested with criminal jurisdiction. This jurisdiction they are bound to exercise, and it can only be exercised through the instrumentality of grand juries. They are, therefore, given by a necessary and indis-

> pensable implication. But, how far is this implication necessary and indispensable? The answer is obvious. Its necessity is co-extensive with that jurisdiction to which it is essential. Grand juries are accessaries to the criminal jurisdiction of a court, and they have power to act, and are bound to act, so far as they can aid that jurisdiction. Thus far, the power is implied, and is as legitimate as if expressly given.

The vitality of the principles stated by Mr. Justice Marshall was reiterated in *Clawson* v. *United States,* 114 U.S. 477, 478-488 (1885), a case decided a scant five years before the *Mills* case. In *Clawson,* the Court, quoting in its entirety the above portion of the *Hill* case, held it proper for the trial court to obtain petit jurors from the body of the judicial district after the names in the box had been exhausted. Moreover, *Mills* itself—even taken on its own terms—represents no departure from the settled views of Mr. Justice Marshall.

In *Mills,* the defendant had been convicted following two indictments of him by a grand jury for the United States District Court for the Western District of Arkansas for crimes committed in the nearby Indian Territory. It appeared, however, that four months prior to the indictments, Congress had passed a statute which established a "United States court" with exclusive original jurisdiction in the Indian Territory over, essentially, misdemeanors; *i.e.,* crimes "not punishable by death or imprisonment at hard labor" (135 U.S. at 265). Because the statute providing the penalty for the petitioner's crime spoke simply of "imprisonment" and not "imprisonment at hard labor", the petitioner claimed that the Indian Territory court had exclusive jurisdiction over the crimes rather than the District Court. In buttressing its rejection of that contention, the court noted that Congress had made no provision for the impanelment of grand juries by the territorial court. The

Court reasoned that such a provision would have been made had it been Congress' intent to invest the territorial court with jurisdiction over the crimes committed by the petitioner.

Thus, the language of *Mills* referring to a grand jury as a "creature of statute" was written in the quite narrow context of interpreting the Congressional intent. Even in that context, as observed by the court in *Morris* v. *United States,* 128 F.2d 912, 916, fn. 3 (5th Cir.), *cert. denied,* 317 U.S. 661 (1942) the *Mills* decision simply confirmed Justice Marshall's view that a District Court's authority respecting a grand jury is co-extensive with its jurisdiction and no less. The *Mills* case simply treated the correlative of that principle.

The fallacy that grand juries are a "creature of statute" and hence derive their powers and their limitations, that is, their jurisdiction, from statutory sources was carried forward by the District Court to support its conclusion that the limitation in Rule 6(g) (as well, apparently, as the impanelment and extension provisions in Sections 3331[a] and 3332[b] of Title 18, U.S.C.) prevented the extension of the grand jury and that its continuance was not simply an irregularity. Yet, the essence of that very proposition was further undermined by the Supreme Court in its decision in *Roche* v. *Evaporated Milk Ass'n., supra.*

In *Roche,* the defendants, indicted for violations of the Sherman Anti-Trust Act, sought a writ of mandamus in the Circuit Court of Appeals to compel the District Court to hear their claims, before trial, respecting the holdover character of the grand jury which indicted them. In support of the propriety of the petition, the defendants claimed, *inter alia,* that their plea in abatement attacked "the power of a grand jury to return an indictment and therefore was jurisdictional . . ." (130 F.2d at 844). Reasoning that the decision of the trial judge, "striking out the pleas", de-

prived the defendants of an "appealable judgment" (130 F.2d at 845), the Circuit Court directed the trial court to hear the factual issues raised by the plea. In reversing the Circuit Court, the Supreme Court, squarely answered the defendants' claim that a holdover grand jury was jurisdictional and, therefore, something more than an irregularity. The Court stated (319 U.S. at 26-27):

> But the present case involves no question of the jurisdiction of the district court. Its jurisdiction of the persons of the defendants, and of the subject matter charged by the indictment, is not questioned. This is not a case like *Ex parte Bain*, 121 U.S. 1, where the petitioner had been convicted on an indictment which, because it had been amended after it was returned by the grand jury, was thought to be "no indictment of a grand jury." Here the indictment was returned by the requisite number of duly qualified grand jurors, acting under order of the court continuing the grand jury in session. The objection that the subject matter of the indictment was not one which the jury had been or could be continued to hear was at most an irregularity which, if the proper subject of a plea in abatement, did not affect the jurisdiction of the court [citations omitted].

To take the statement in the *Mills* case out of context and thereby elevate it to a separate principle of law—that a grand jury is a creature of statute—is simply and unequivocally wrong.

2. The General Rule

A review of the reported cases shows that technical objections to the regularity of impanelment or organization of a grand jury have been uniformly rejected by the courts. The "general rule" as stated by the Supreme Court

in *Agnew* v. *United States,* 165 U.S. 36, 44 (1897): ". . . is that for such irregularities as do not prejudice the defendant, he has no cause of complaint, and can take no exception" [citations omitted]. Mr. Justice Holmes repeated the same thought in *Breese* v. *United States,* 226 U.S. 1, 11 (1912), wherein he stated: ". . . objections of this sort are not to be favored when no prejudice to the defendants is shown; . . ." See also, *Breese* v. *United States,* 203 F. 824, 828 (4th Cir. 1913) (grand jury proceedings valid even though court failed to enter an order directing the issuance of a writ of *venire facias* as required by the then Section 810 of the Revised Statutes); *Nolan* v. *United States,* 163 F.2d 768, 769 (8th Cir. 1947), *cert. denied,* 333 U.S. 846 (1948) (court's failure to sign order directing issuance of a writ of *venire facias* did not affect legality of grand jury's proceedings).*

In situations where the grand jury has not, apparently, been organized in the manner provided by statute, the courts have been loath to find a Congressional intent to interfere with the courts' overall jurisdiction concerning grand juries. Much less have the courts found a Congressional intent to legislate as to the validity of indictments.

In *United States* v. *Eagan,* 30 F. 608 (8th Cir. 1887), the defendant claimed by his plea in abatement that the grand jury which indicted him was not organized in the manner then provided by Congress. At the time, the relevant statutory provision required, in an apparent effort to insure the impartial selection of jurors, that all grand and petit jurors,

> ". . . shall be publicly drawn from a box containing, at the time of each drawing, the names of not

* The immediate contrast is to those cases which have dealt with objections to the composition of the grand jury and which deal with the very integrity of the deliberative process. See, e.g., *Reece* v. *Georgia,* 350 U.S. 85 (1955).

> less than three hundred persons possessing the qualifications prescribed in section eight hundred of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed there." (21 Stat. 43 [Chap. 52, Sec. 2, June 30, 1879]).

It appears that, in the *Eagan* case, five of the grand jurors were not chosen as provided in the statute in that they were not drawn from the box, but, rather, summoned by the Court from the "body of the district." Speaking for the court, Judge Brewer (later Associate Justice of the Supreme Court) observed that ". . . a challenge to a grand jury, based on the mere ground of irregularity in its organization, was never regarded with any favor; less so to-day than ever" (30 F. at 609). In overruling the plea he stated:

> ". . . it would require very clear and emphatic language on the part of congress which should be construed as taking away the power of the court, in an emergency, to fill up in a speedy way a partially formed jury.
>
> * * * * *
>
> . . . so that I have no doubt that the court has to-day, as it always has had, the power to summon from the by-standers to fill up a petit jury, and to summon from the body of the district, in an emergency, for completing a grand jury." (*United States* v. *Eagan, supra,* at 611).

In his concurring opinion in the *Eagan* case, Judge Thayer disagreed with Judge Brewer and was of the opinion that there had been an irregularity in the selection of the jury. Nevertheless, he concluded that the plea had to be overruled ". . . *when it appears that the jurors* so irregularly chosen were competent and qualified jurors, . . ." [emphasis in original] (*United States* v. *Eagan, supra,* at 611-612).

Thus, whether an apparent irregularity in the organization or impanelment of a grand jury is viewed as a technical violation of a statute not going to the integrity of the deliberative process or no violation in the sense that the statutory provision is viewed as only directory and not intended to impose mandatory restrictions on the court, the end result is that the indictment is valid. Simply put, the *Eagan* case stands for the proposition that Congress, when it enacted provisions of law directing the manner in which grand juries were to be chosen, did not thereby make the quantum leap of also legislating as to the validity of indictments.

Whether or not Congress intended otherwise when it enacted Rule 6(g) is a question which is best answered by reference to the cases and legislation dealing with the subject.

3. Predecessors to Rule 6(g)

In *United States* v. *Rockefeller,* 221 F. 462 (S.D.N.Y. 1914), the defendant filed pleas in abatement, asserting, *inter alia,* that the grand jury impaneled at the September term, was without power to return an indictment at the October term of court even though the court had made an order so extending it. In disposing of the contention, the court observed:

> In and by section 284 of the Judicial Code Congress has provided that the—

> "court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so."

The apparent purpose of this legislation was to provide a way in which a grand jury, with the permission of the court, may complete and conclude any investigation which it has actually commenced. In a district like this one, having monthly terms of court, it must frequently happen that a grand jury will not be able to conclude its work upon a long and complicated case before the expiration of one term and the commencement of another. If, under such circumstances, a grand jury cannot be permitted to finish its labors, there will follow much unnecessary expense, many unfortunate delays, frequent and severe hardships for the accused, and, sometimes, a complete failure of justice. The statute plainly provides a sure and simple means of avoiding these and other serious consequences. (*United States* v. *Rockefeller, supra,* at 466).

Similarly, in *Elwell* v. *United States,* 275 F. 775 (7th Cir.), *cert. denied,* 257 U.S. 647 (1921), the court disagreed with the defendant's claims respecting the nullity of proceedings before a holdover grand jury. In *Elwell,* the defendant, a journalist, was subpoenaed to appear in February, 1920, before the December 1919, term grand jury of the Court. Following his refusal to answer questions, he was directed by the court to appear before the grand jury on March 15, which he did, although he still refused to answer questions. He was held in contempt. In seeking to vacate the order of contempt, the defendant charged that, because of the holdover character of the grand jury, there was no basis for the contempt. The Court rejected that contention:

1. The question as to whether there was a grand jury before which plaintiff could be required to answer is partially disposed of by plaintiff's own motion, which says:

> "The said persons who had composed the December, 1919, grand jury aforesaid, after separating as aforesaid, did not thereafter assemble until on March 15, 1920, * * * when they assembled and assumed to act as a grand jury."

It is admitted that the grand jury during the December term was legal. The motion shows a de facto grand jury on March 15, 1920. Section 284 of the Judicial Code (Comp. St. § 1261), referring to the District Court, provides:

> "And said court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct."

An order of the District Court entered January 31, 1920, showed unfinished business before the grand jury, and expressly continued its existence to finish business then before it [citations omitted]. There is some claim that the formal order continuing the jury is not properly shown. In any event the court that originally organized it was treating it as a bona fide grand jury, and it was doing the business ordered by the court. (*United States* v. *Elwell, supra,* at 777-778).

The *Rockefeller* and *Elwell* decisions were reached in the light of Section 284 of the Judicial Code (36 Stat. 1165). That Section provided in relevant part as follows:

> SEC. 284. No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the

> district attorney that such jury will be needed, orders a venire to issue therefor. * * * And said court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so.

The statutory predecessors of Section 284 made no mention, as Section 284 did not, of any time limitation to the service of a grand jury. Thus, the immediate predecessor of Section 284 also provided, in pertinent part that ". . . courts may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, *whenever in its judgment it may be proper to do so*" (Emphasis added) (36 Stat. 267 [Chap. 134, March 28, 1910]). The same language was present in Section 810 of the Revised Statutes (Revised Statutes, 2d Edition, p. 151 [1878]).*

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* The provision in the Revised Statutes seems to have been a combination of two prior statutes. In 1846, Congress, in rewording a prior provision (4 Stat. 188 [Chap. 136, May 20, 1826]), which required that a grand jury be summoned only upon court order, stated: "That nothing herein shall prevent . . . courts in term from directing a grand jury to be summoned and impanelled whenever, in its judgment, it may be proper to do so, and at such time as it may direct: . . ." (9 Stat. 73 [Chap. 98, Sec. 3, August 8, 1846]).

In 1856, Congress provided District Courts, in an act devoted exclusively to fiscal concerns, with the power to discharge grand juries "whenever they shall be of the opinion that the public interests will not be subserved by a further continuance of the session of said grand jury" (11 Stat. 49, 50 [Chap. 124, Sec. 7, August 16, 1856]). Certainly, the power of a court to discharge a grand jury could not have been seriously questioned. That provision, therefore, surely must have been simply a direction to the courts to conserve funds where possible. One must also assume that, in the same spirit of frugality, Congress, in 1826, required that writs of *venire facias* be issued only upon order of the court, rather than upon order of the marshal (4 Stat. 188 [Chap. 136, May 20, 1826]), a practice which apparently existed before 1826, as it had in England. (IV Lewis' Blackstone, pp. 1694-1695; See also, 1 Stat. 88 [Section 29 of the Judiciary Act of 1789]).

Though there is no specific indication that the language in Section 284 of the Judicial Code was designed for the purpose stated in the *Rockefeller* decision, it nonetheless appears that, during the years in which the foregoing statute was in effect, no court ordered extension of a grand jury's tenure was found lacking in authority. Indeed, research has not disclosed any case decided prior to the Circuit Court's decision in *United States* v. *Johnson, supra,* which found such an extension invalid.* Simply put, at no time had the authority of a court to extend the service of a grand jury for the purpose of continuing an investigation been called into question. The statutory language cited in the *Rockefeller* and *Elwell* cases was, apparently, confirmatory of the implied powers of District Courts and does not appear to have been considered a grant of authority which did not otherwise exist.

Notwithstanding the unquestioned authority of District Courts to extend the term of a grand jury's service to complete investigations, some question arose in the 1920s in the United States Department of Justice as to the precedential value of the *Rockefeller* and *Elwell* decisions.** As detailed in Judge Wilkerson's opinion in *United States* v. *Malone,* 18 F. Supp. 865, 867-868 (N.D. Ill., 1937), *aff'd,* 94 F.2d 281 (7th Cir.), *cert. denied,* 304 U.S. 562 (1938) the

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* Conversely, no reported case has been found prior to 1914, when *United States* v. *Rockefeller, supra,* was decided, which held that a court could extend a grand jury's tenure. It appears that the issue had never been raised and small wonder: In 1832 the number of indictments filed in the Southern District of New York was 12; and in 1872 the number increased to 131. 1 Zoline's Federal Criminal Law and Procedure, Introduction by Hon. Henry Wade Rogers, p. vi (1921).

** It is somewhat ironic that, at the same time that the Justice Department was questioning the holdings in *Rockefeller* and *Elwell,* the Fourth Circuit Court of Appeals was following those decisions. See, *Johnson* v. *United States,* 5 F.2d 471, 473 (4th Cir.), *cert. denied,* 269 U.S. 574 (1925). In addition, the court in *United States* v. *Herzig,* 26 F.2d 487, 488 (S.D.N.Y. 1928) had recognized, albeit in dictum, that the validity of an indictment was unaffected by the *de facto* character of the grand jury.

Justice Department, fearful that some later decision might question the authority of a District Court to extend a grand jury's service (a grossly self-fulfilling prophecy) requested and eventually obtained Congressional legislation expressly authorizing such extensions. Thus, it came about that in 1931 the following change was made in Section 284 of the Judicial Code:

> And said court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. And the district judge or the senior district judge, as the case may be, may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury: *Provided, however,* That no grand jury shall be permitted to sit in all during more than three terms. (46 Stat. 1417 [Chap. 297, February 25, 1931]).

In *United States* v. *Malone, supra,* the Court held that the changes made in the amended Section 284 were not made with a view toward restricting the power of District Courts. The Court stated (18 F. Supp. at 868):

> The purpose of the statute being to confirm a power which some courts had held existed without express statutory authority, it should not be construed to take away that power unless the language clearly requires it.
>
> For many years the judges of the Southern District of New York and the Northern District of Illinois acted upon the assumption that the court had power to authorize a grand jury to hold over. United States v. Rockefeller, supra; Elwell v. United States, supra. See, also, Johnson v. United States,

> 5 F.(2d) 471 (C.C.A.4). The Attorney General, however, thought the question was doubtful and was of the opinion that there should be express authority in the statute for the court to continue the grand jury.
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> * * * * *
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> In the light of this legislative history, the language used in the amendment of 1931 should not be construed to take away from a judge who has the power to summon a regular grand jury the power to make an order of court by which the grand jury is authorized to take up at a succeeding term its unfinished work.[*]

That section came before the Supreme Court in *United States* v. *Johnson, supra.* In *Johnson,* the Seventh Circuit Court of Appeals (123 F.2d 111 [1941]) had found that the indictment, which charged the defendants for multiple years of tax evasion and conspiracy, was defective because the grand jury was improperly extended, although by court order, into its third term of service. The Court reasoned, based upon a tortured reading of the grand jury's request for the extension, that the order granting the extension impermissibly allowed the grand jury to inquire into matters which it had not commenced at its initial term. Mr. Justice Frankfurter rejected that position, stating (319 U.S. at 509-510):

> To read it [the grand jury's request] as the court below read it is to go out of one's way in finding that the judge who granted the order of extension either wilfully or irresponsibly did a legally forbidden act, namely, to allow a grand jury to sit

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* The precise issue in *Malone* involved the question of which particular judge of the District Court had the authority to extend a grand jury's term, rather than the authority to extend, which, in that case had been for two additional terms. The rationale of the decision, however, would seem to be broadly applicable.

> beyond the term and take up new instead of finishing old business. For the legal limitations governing extension of the life of a grand jury do not lie in a recondite field of law in which a federal district judge may easily slip. Certainly every district judge in a great metropolitan center like Chicago knows that in authorizing a grand jury to continue to sit "for the purpose of finishing" their "investigations," the "investigations" must have been begun during the grand jury's original term and that new domains of inquiry may not thereafter be entered by the grand jury.

Judge Dooling has considered the Supreme Court's opinion in the *Johnson* case, as well, apparently, as its opinion in *Roche,* as confirming the notion that there is no federal court recognition of *de facto* grand juries. That assumption seems questionable. As has already been noted, (supra at p. 15-16), the *Roche* decision, which was decided in the same term as the Court's decision in *Johnson,* expressly observed that the improper continuation of the grand jury "was at most an irregularity." As to *Johnson,* the language quoted earlier simply appears as a confirmation of the view, previously expressed in *Roche,* that a grand jury's term cannot be extended to take up new matters. The *Johnson* decision in no way indicates an acceptance of the notion that there is no recognition of a *de facto* grand jury in federal courts and in no way indicates an acceptance of any notion that Congress intended to affect the validity of indictments by the statute. To the contrary, the court in *Johnson* observed that the Act of 1931 was designed:

> ". . . to make the grand jury a more continuous and therefore more competent instrument of what have become increasingly more complicated inquiries into violations of the enlarged domain of federal criminal law." (*United States* v. *Johnson, supra,* at 511).

In addition, Mr. Justice Frankfurter, speaking of the 1940 amendment to Section 284 of the Judicial Code (54 Stat. 110 [Chap. 101, April 17, 1940]), which changed the three term period to an 18 month period, stated:

> "The considerations which induced Congress to enlarge still further the already ample scope of grand jury investigations and the manner in which the House committee report spoke of a grand jury's work, see H. Rep. No. 1747, 76th Cong., 3d Sess., are but confirmation that that for which a grand jury may continue its sitting is the general subject-matter on which it originally began its labors. It is not forbidden to inquire into new matters within the general scope of its inquiry but only into a truly new, in the sense of dissociated, subject-matter." (*United States* v. *Johnson, supra,* at 511).

Thus the thrust of the *Johnson* opinion is a recognition of the trend of Congress to confirm or widen, when necessary, the District Courts' flexibility in administering grand juries. Rather than accepting the view of the Circuit Court that there is no such thing as a *de facto* grand jury in federal courts, it would seem that the *Johnson* decision more aptly stands for the proposition that Congress did not intend to fetter the operation of grand juries or legislate as to the validity of indictments. Thus, in addressing itself to the particular grand jury investigation involved in *Johnson,* the court stated (319 U.S. at 511-512):

> "The grand jury found a systematic practice of tax evasion over a course of years, and yet, so we are urged, it could not continue to ferret out one more phase of this continuous course of fraudulent conduct because that did not ripen into a separate offense until the last term of the grand jury's sitting. So to hold is to make of the grand jury a pawn in a technical game instead of respecting it as a great historic instrument of lay inquiry into criminal wrongdoing [citations omitted]."

Aside from *Roche* v. *Evaporated Milk Assn., supra,* and *United States* v. *Johnson, supra,* the only other decision which involved the apparent limitations in the 1931 or 1940 Acts was *United States* v. *McKay,* 45 F. Supp. 1007 (D.C. Mich. 1942). *McKay* was decided prior to the Circuit Court's decision as well as prior, of course, to the Supreme Court's decision reversing *Roche, supra,* and prior to the Supreme Court's reversal of the decision in *Johnson, supra.* Thus, relying exclusively upon the Circuit Court's opinion in *Johnson* and a mistaken interpretation of the *Mills* case, the court in *McKay* concluded that an extended grand jury could not return valid indictments respecting matters initially considered during its extended term. The court stated (45 F. Supp. at 1015):

> The question involved here is solely the legality of its existence after the termination of the March, 1940, term. A United States District Court is one of limited jurisdiction with only such powers as are expressly conferred by statute. The grand jury sitting in such a court is strictly a creature of statute. In re Mills, Petitioner, 135 U.S. 263, 267, 10 S.Ct. 762, 34 L.Ed. 107. There is no such thing as a de facto grand jury in a Federal Court. Its original life and authority to act, and any continued existence which it may have after the expiration of the term for which it was impaneled, depends strictly upon statutory authority, and unless that authority is compiled with there is no jurisdiction to return an indictment. These questions were discussed at length by the Circuit Court of Appeals for the 7th Circuit in United States v. Johnson, 123 F.2d 111, in which the present contentions of the Government were all disposed of adversely to the Government's position in this case.

Suffice it to say that, except in the District Court's decision, *McKay* has never been followed. It appears, also, that the

Court in *McKay* did not consider the teachings of Justice Marshall or the careful research of Judge Wilkerson, for the citations to *United States* v. *Hill, supra,* and *United States* v. *Malone, supra,* appear nowhere in the Court's opinion. In addition, as noted above, the Supreme Court had not yet decided the *Roche* and *Johnson* cases.

If the *McKay* decision is to survive as precedent, then it must be reconciled with the other authorities. Of course, the major premise of *McKay*—as with the District Court's decision in this case—is that a grand jury "is strictly a creature of statute." But it is not. No doubt, Congress, which under the Constitution may regulate the criminal jurisdiction of the Federal Courts, may in the area of grand juries, as well restrict "a power which . . . existed without express statutory authority . . . ," *United States* v. *Malone, supra,* at 868. There is, however, no indication that Congress, by providing a time limitation in the 1931 Act, or in expanding that limitation in 1940, ever intended to alter the principle of the *Rockefeller* and *Elwell* cases.

Morris v. *United States, supra,* further elucidates the intent of Congress in enacting the 1940 Act. In that case the court was called upon to determine whether Section 284 impaired the District Court's jurisdiction to impanel separate grand juries in different divisions of the same district. At that time, Section 284 of the Judicial Code, provided that a District Court could impanel two grand juries in a single district if, (1) within the district there was a municipality of "at least three hundred thousand inhabitants," and (2) if the United States Attorney for the district certified to the court "that the exigencies of the public service required a second grand jury." (28 U.S.C. § 421, as amended). Notwithstanding the statute, the defendant in *Morris* was indicted by a second grand jury in the Western District of Louisiana which, in apparent violation of the statute, had been impaneled while a previously convened grand jury was still sitting. From

the case, it appears that no certification of necessity was submitted by the United States Attorney and, indeed, that the Western District of Louisiana had no municipality with more than 300,000 inhabitants. The defendant's claim, the same as that made in the District Court by appellee, was that the grand jury which indicted him had no legal existence. The court, however, rejected the contention. Upon its review of the statute and the authorities the court in *Morris* stated, in much the same tone as Judge Brewer had used a half century before in the *Eagan* case (128 F.2d at 916):

> We are of the opinion that in enacting this statute, Congress had no intent to legislate as to the validity of indictments. The purpose was merely to prevent the expense of having a grand jury unnecessarily summoned. * * * No citation of authority is needed therefore to convince that, in the absence of a statutory prohibition or limitation upon its jurisdiction as a federal court authorized to consider offenses requiring indictment, the judge or judges of any district court have power to draw grand juries in each division and the grand juries so drawn have power to act without regard to the presence and functioning of grand juries in other divisions. * * * we think the statute as to the number of grand juries permissible in the different situations named in it, was only directory and not intended to impose mandatory restrictions on the judge.[*]

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* Compare, *United States* v. *Perlstein*, 39 F. Supp. 965 (D.C. N.J. 1941), *aff'd*, 126 F.2d 789 (3d Cir.), *cert. denied*, 316 U.S. 678 (1942).

4. Rule 6(g) and the Special Grand Jury Provisions of the Organized Crime Control Act of 1970

With the enactment of the Federal Rules of Criminal Procedure in 1946, Congress repealed Section 284 of the Judicial Code.* Rule 6(g) provides that "no grand jury may serve more than 18 months." No prior case has determined whether that provision is a mandate which deprives the District Courts of their historical prerogative or implied power to extend, out of necessity, the term of a grand jury which is in the midst of a complicated investigation. Even if the legislative history is read to indicate that that was the intention of the provision, no prior case has decided whether a grand jury sitting under such an extension (a *de facto* grand jury) is powerless to return a valid indictment. Two decisions, however, *United States* v. *Wallace & Tiernan, Inc.*, 349 F.2d 222 (D.C. Cir. 1965) and *Shimon* v. *United States*, 352 F.2d 449 (D.C. Cir. 1965), though not deciding those precise questions, by their analysis of similar provisions under the District of Columbia Code, seem to continue the view that, at the very least, statutory provisions relating to grand juries are not intended to affect the validity of indictments even if they do limit the courts' prerogatives or implied powers. But, even if one could unhesitatingly state that Congress did intend in Rule 6(g) to arbitrarily curtail grand jury investigations, it is clear that the provisions in the Organized Crime Control Act of 1970 dealing with grand juries

* It is noteworthy that whereas the Judicial Code provision respecting the tenure of grand juries stated that, "no grand jury *shall be* permitted to sit in all during more than eighteen months" (emphasis added) (54 Stat. 110 [Chap. 101, April 17, 1940]), the analogous provision in Rule 6(g) of the F.R.C.P. provides that "no grand jury *may* serve more than 18 months" (emphasis added). One would think that, if Congress intended to transform the 18 month limitation from a directory provision to a mandate ultimately affecting the power of the grand jury to indict it would, at least, have retained the word "shall".

(Title 18, United States Code, Sections 3331, *et seq.*) continue Congress' main trend of widening the power of the District Courts in administering grand juries and in a case such as this should be held to supplant any limitations that might be read into Rule 6(g) with respect to the validity of indictments.

(1)

In *United States* v. *Wallace & Tiernan, Inc., supra,* the defendants urged that the indictment was a nullity because the grand jury had been improperly convened under a provision in the District of Columbia Code which required the Chief Judge to order the impanelment of grand juries or, in his stead, the "presiding judge." Notwithstanding that provision, the grand jury which indicted the defendants was ordered impaneled by a District Judge other than specified in the Code. In response, the Government contended that Rule 6(a), F.R.C.P., which spoke simply of "the court," without further differentiation, governed despite the inconsistent Code provision. In addition, it appeared that since 1946, when the Federal Rules of Criminal Procedure were enacted, all judges on the District Court considered themselves empowered to convene additional grand juries.

The Court in *Wallace & Tiernan* rejected the defendants' contention on two grounds. In the first instance, the court, noting the practical interpretation by the judges of the District Court since the enactment of Rule 6, adopted the Government's position and held that the provision in Rule 6(a) F.R.C.P., controlled. The second and equally pertinent ground for the decision was the court's belief that the Code provision, even if applicable, was not intended "to protect those whose activities the grand jury was summoned to investigate, at least absent a showing of prejudice" (349 F.2d at 227). Upon its review of the Code provision's legislative history, the court stated (349 F.2d at 227-228) :

> The decision to confine this authority to the Chief Judge alone, however, is unexplained. It may have been intended to prevent the summoning of additional grand juries unnecessarily by vesting authority in only one judge, who presumably would be in closest touch with the needs of the prosecutor and the demands on the grand jury already sitting. Such an intention is consistent with what appears to have been a congressional purpose to limit the demands on potential grand jurors and hold down the cost of grand jury service to the taxpayers.
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> We are of the opinion, therefore, that "in enacting this statute Congress had no intent to legislate as to the validity of indictments." Breese v. United States, 203 F. 824, 828 (4th Cir. 1913) [citations omitted]. . . . The principle underlying these and many other decisions is not difficult to discern: Irregularities in the summoning and impenelling of a grand jury will not automatically invalidate the indictments it returns, in the absence of some showing of prejudice or possibility of prejudice to the accused [citations omitted]. Certainly this is true when the statute whose precise requirements have been overlooked is one intended to protect the public treasury and minimize the demands of jury service, rather than safeguard the rights of the accused. See People v. Lieber, 357 Ill. 423, 192 N.E. 331 (1934).

The reasoning of the court in the *Wallace & Tiernan* case seems subsequently to have been followed in *Shimon* v. *United States, supra,* a decision written by then Circuit Judge Burger. In *Shimon,* not only had the grand jury been impaneled by a "regular" District Judge but it had been sitting beyond the one term limit imposed by D.C. Code § 11-1408 (1961 ed), when the defendant obstructed its deliberations and when it finally indicted him.

It appears from the decision that the defendant's precise claim in *Shimon* was somewhat different than the contention made by the appellee herein. Whereas appellee has broadly claimed that the grand jury had, simply, no authority to indict, the defendant in *Shimon* contended that by reason of the infirmities in its organization and continuance, the grand jury could not have been obstructed in violation of 18 U.S.C. § 1503 (19588). In all events, the court was not persuaded: "Congress' concern with the obstruction of justice may not be avoided by such empty technicalities [citations omitted]. During the period of the events in question here everyone concerned treated the Grand Jury as such, . . ." (352 F.2d at 450-451). But the court went further and observed:

> Assuming, *arguendo,* that Appellant has standing to assert it here, our recent holding in United States v. Wallace & Tiernan, Inc., 121 U.S. App. D.C. —, 349 F.2d 222, June 23, 1965, disposes of his contention as to the impaneling of the Grand Jury. Under that case an indictment returned by a Grand Jury impaneled as was the present one is valid, since Fed. R. Crim. P. 6(a) superseded Section 1408. The logic of that case argues as well for the conclusion that this Grand Jury, though acting beyond its term, had the power to indict. See also 28 U.S.C. § 452; Fed. R. Crim. P. 6(g). Since the Grand Jury could have brought valid indictments, it follows a fortiorari that it could have been a subject of obstruction, whatever may be the case with grand juries so defectively constituted as to be unable to return valid indictments.[*]

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* In nearly every respect, given its applicability, the *Shimon* case involved facts identical to those in the case at bar. In *Shimon,* the grand jury had been investigating the defendant's alleged electronic "bugging" of private hotel rooms and during the course of that investigation the defendant corruptly endeavored to influence a witness' testimony. At bar, the grand jury was investigating

Even were the issue in this case solely concerned with the limitation in Rule 6(g), it would seem that the indictment herein should still not have been dismissed. The course of all judicial precedent as well as Congressional legislation has pointed toward the widening of the courts' jurisdiction to deal with the necessities of administering grand juries. No case, persuasively reasoned, has ever throttled the courts in dealing with those necessities or ruled inapplicable the doctrine of a *de facto* grand jury. The *Wallace* and *Tiernan* case, as well as the *Shimon* case, continue to point in the single direction that Congress has never evinced an intent to legislate as to the validity of indictments through its directions regarding the service of grand juries. In this case however, this Court need not review the holding of the District Court solely in the context of Rule 6. For, in the case at bar, the grand jury was extended pursuant to a provision in Title 18, United States Code, Section 3331(a), which expressly provides for extensions beyond the 18 month limitation in Rule 6(g).

On October 15, 1970, the Organized Crime Control Act (the "Act") came into effect. As part of that Act, Con-

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appellee's alleged misconduct as a government employee and he allegedly committed perjury before the same grand jury. The only distinction between the *Shimon* case and the case herein was that the grand jury in *Shimon* was required to sit for only one month under the D.C. Code whereas in the instant case the grand jury was impanelled initially for 18 months. Nevertheless, because there apparently was no court order extending the grand jury's term in *Shimon* and because the Court stated that the grand jury was acting beyond "its term," it would seem that the court, when it referred to the "logic" of the *Wallace and Tiernan* case, was referring to the second ground of that decision, to wit: that in enacting the statute Congress had no intent to legislate as to the validity of indictments. This interpretation is further supported by the form of the citation, "see also," which precedes the citation of Rule 6(g), a phrase defined in "A Uniform System of Citation" (11th Ed.; p. 88 [1967]) as follows:

> Cited authority is broader in scope than, or develops a question analogous to, discussion in text without lending support to proposition asserted, but can profitably be compared with it.

gress provided for the establishment of special 18 month grand juries. The statute (Title 18, U.S.C., § 3331[a]) provided for the establishment, by the Court, of a special grand jury in districts "containing more than four million inhabitants" and, also, in districts where the Justice Department certifies that the level of "criminal activity in the district" requires a special grand jury. Moreover, where the District Court considers an additional special grand jury necessary, it may act accordingly. Thus, Section 3332(b) provides:

> Whenever the district court determines that the volume of business of the special grand jury exceeds the capacity of the grand jury to discharge its obligations, the district court may order an additional special grand jury for that district to be impaneled.

In addition to the District Courts' authority to convene special grand juries, the statute also provides for the extension of such grand juries beyond the 18 month term for up to three additional six month terms where "the district court determines the business of the grand jury has not been completed." (§ 3331[a]).*

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* The provisions in the Act dealing with extensions are as follows:

§ 3331. Summoning and term

(a) * * *

The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

(b) If a district court within any judicial circuit fails to extend the term of a special grand jury or enters an order

The order extending the term of the March 1971 special grand jury cited Section 3331 of the Act as authority for the extension. Concededly, the special grand jury was not expressly convened pursuant to the Act. Rather it was convened pursuant to Rule 6(a) and (g) of the Federal Rules of Criminal Procedure.* Nevertheless, as

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for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

§ 3333. Reports

* * * * *

(e) Whenever the court to which a report is submitted pursuant to paragraph (1) of subsection (a) of this section is not satisfied that the report complies with the provisions of subsection (b) of this section, it may direct that additional testimony be taken before the same grand jury, or it shall make an order sealing such report, and it shall not be filed as a public record or be subject to subpoena or otherwise made public until the provisions of subsection (b) of this section are met. A special grand jury term may be extended by the district court beyond thirty-six months in order that such additional testimony may be taken or the provisions of subsection (b) of this section may be met.

* From subsequent orders convening special grand juries, as well as the order convening the January, 1971 special grand jury, (see Order for a Special Grand Jury, dated January 22, 1971, Government's Appendix, p. A-79) it appears that the District Court expressly designated organized crime grand juries if only by reference to Chapter 216 in the orders which convened them. (See, Order for a Special Grand Jury, dated May 5, 1972, Government's Appendix, p. A-87; Order for a Special Grand Jury, dated June 19, 1972, Government's Appendix, p. A-91; and Order for a Special Grand Jury, dated September 6, 1972, Government's Ap-

will be shown below, it cannot be seriously questioned that the March 1971 special grand jury in its massive FHA-VA investigation functioned as an organized crime grand jury within the meaning of the Act. The question thus arises whether or not the provisions of Section 3331 can properly be applied to a grand jury which, though not expressly convened pursuant to that section, functions as though it had been.* The Government submits that the extension provision of Section 3331 can be applied to such a grand jury.

The affidavit of the Assistant United States Attorney submitted in opposition to the motion to dismiss in the *McDonnell* case, *supra,* pp. 3-9, shows the development and scope of the FHA-VA investigation conducted before

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pendix, p. A-93). At the same time, it appears that "regular" (for lack of a better term) special 18 month grand juries were also being convened (see, Order for a Special Grand Jury, dated March 15, 1972, Government's Appendix, p. A-85; Order for a Special Grand Jury, dated May 3, 1972, Government's Appendix, p. A-90; and Order for a Special Grand Jury, dated July 11, 1973, Government's Appendix, p. A-94).

* Judge Dooling did not decide this question. The decision below was based on the failure to make a determination under § 3332(b) that the volume of business of the existing Section 3331 grand jury exceeded its capacity. Judge Dooling held (Government's Appendix, p. A-65): "It might be thought possible to extend the Grand Jury's life by converting the Rule 6 Special Grand Jury into a Section 3331, 3332(b) Grand Jury. However, since a Section 3331 (a) Grand Jury was already sitting, conversion of the March 1971 Grand Jury into a Section 3332(b) Special Grand Jury, if possible at all, would have required the special determination of Section 3332(b), and that was not made." With all due respect, the Government submits that the prior case law and legislation discussed earlier clearly indicates that such a provision as to the permissible number of grand juries does not affect the validity of indictments, whether viewed as directory or as a procedural irregularity. Section 3332(b) does not state that the situation therein described is the *only* situation in which a Court may order an addition special grand jury to be convened. The use of the language "at least once" in § 3331 further supports the view that § 3332(b) is a directory provision. See, *Morris* v. *United States, supra,* 128 F.2d at 916.

the March, 1971, special grand jury. That affidavit shows an intensive investigation which, during its course, returned the indictment dismissed by the District Court against appellee. The grand jury, though originally empaneled pursuant to Rule 6, subsequently uncovered during the course of its investigation a broader, more complex pattern of crime than was initially expected; a pattern which included widespread fraud and extensive bribery of public officials and which was organized in the sense that the criminal activity involved wide-ranging conspiracies with large numbers of defendants operating through central figures in comprehensive, overall schemes. Thus it became a grand jury whose circumstances clearly required a lengthy investigation to uncover the organized criminal activity. Moreover, there can be no doubt that it became a special grand jury investigating organized criminal activity within the purview of Section 3331. As this Court recently observed in *United States* v. *Carter*, — F.2d — (2d Cir.) (slip op. 2011, 2017-2018; decided February 23, 1974):

> ". . . we could not accept the proposition that the Congress did not intend to include corruption, obstruction of justice and perjury within the purview of the statute. While crimes of violence engineered by gangs of thugs are of course repulsive and clearly within the concept of organized criminal activity, the concerted corruption charged here is equally odious. The fact that the alleged perpetrators are presumably respectable and entrusted with responsibility by an electorate or a profession or by stockholders does not suggest, in our view, that they are incapable of engaging in organized criminal activity. We all stand equal before the bar of criminal justice, and the wearing of a white

collar, even though it is starched, does not preclude organized pursuit of unlawful profit." *

The express provisions of the Act are silent as to whether or not Section 3331 can be used to extend the term of a special grand jury investigating organized criminal activity which was not expressly convened pursuant to the Act. The purpose of the provisions of Section 3331 "is to make available a sufficient number of grand juries in each judicial district to accommodate the general needs of the district and the special needs of the typically lengthy organized crime case." House Report No. 91-1549, *U.S. Code Cong. & Admin. News,* 91st Cong., 2d Sess., at p. 4014. Congress noted that with "an increasingly complex society, especially where organized crime is concerned, it becomes necessary to insure that grand juries are allowed to sit until completion of their work, although there must be a limit as to how long they may sit." Senate Report No. 91-617, 91st Cong., 1st Session, at p. 141. Thus, Con-

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* The Court further noted that (footnote, slip op. at 2017):

"'Organized criminal activity' is not defined in the statute, however, it is clear that it was not intended that it be given a restrictive interpretation. Congressman Poff described the term as being 'broader in scope than the concept of organized crime; it is meant to include any criminal activity collectively undertaken . . .' 116 Cong. Rec. 35293 (Oct. 7, 1970). Senator Hruska, a co-sponsor of the bill, advised the Senate that the term included all criminal activity that was 'not an isolated offense by an isolated offender . . .' 116 Cong. Rec. 36294 (Oct. 12, 1970)."

Additionally Congress found that organized crime is a "highly sophisticated, diversified, and widespread activity," that it uses "force, fraud, and corruption" to achieve its goals, and that its criminal activities "undermine the general welfare of the Nation and its citizens." Senate Report No. 91-617, 91st Congress, 1st Session, at pp. 1, 2. It noted that "official corruption is the bedrock of organized crime." *Id.* at p. 142. Surely the circumstances of the FHA investigation as noted above fall within this area of Congressional concern.

gress recognized that there were circumstances in which an investigation would of necessity require an unusually long time, and accordingly enacted the provisions of Section 3331. The purpose of using Section 3331 to extend the term of the grand jury under the circumstances of this case would be to enhance effective investigations of complex organized criminal activity. Such an interpretation of Section 3331 would be consistent with the purpose of the extension provisions of the Organized Crime Control Act of 1970, noted above. Such an interpretation is further supported by the prior case law. Thus, in *United States* v. *Johnson, supra,* 319 U.S. at 510-511, the Supreme Court, in rejecting a narrow interpretation of a prior federal statute governing extension of a grand jury's term, stated:

> The very purpose of the Act of February 25, 1931, 46 Stat. 1417, 28 U.S.C. § 421, allowing grand juries to continue investigations beyond the arbitrary periods that constitute terms of court in the various federal districts, was to make the grand jury a more continuous and therefore more competent instrument of what have become increasingly more complicated inquiries into violations of the enlarged domain of federal criminal law.
>
> . . . that for which a grand jury may continue its sitting is the general subject-matter on which it originally began its labors. It is not forbidden to inquire into new matters within the general scope of its inquiry but only into a truly new, in the sense of dissociated, subject-matter.

The Congressional recognition of the need for lengthy grand jury investigations, has been recognized in the Eastern District of New York where the practice has been to extend under Section 3331(a)—albeit, without expressly considering the propriety—where necessity dictates, the terms of special 18 month grand juries, even though convened under Rule 6 alone. The grand jury which indicted appellant was

extended for one six month period by Judge Mishler (see Order dated August 30, 1972, Government's Appendix, p. A-82) and for a second six month period, again by Judge Mishler (see Order dated February 2, 1973, Government's Appendix, p. A-83).* In addition, a so-called Rule 6(g) special 18 month grand jury convened on March 20, 1972 was extended for six months by Judge Weinstein (see Order dated September 13, 1973; Government's Appendix, p. A-86).** Finally, a third "Rule 6" special 18 month grand jury which had been convened on June 17, 1970 was also extended for an additional six months by Chief Judge Mishler pursuant to Section 3331(a) (see Order dated December 13, 1971; Government's Appendix, p. A-74).

It can be seen, then, that a practical interpretation given to the interplay between Rule 6(g) and Section 3331(a) permits the extension of Rule 6 grand juries beyond 18 months where necessity requires such extensions. As Judge Weinstein noted at the hearing on the motion in *United States* v. *McDonnell, supra*: "We have a lot of organized crime in this district" (See Transcript of November 21, 1973 hearing before Hon. Jack Weinstein, Government's Appendix, p. A-59). Certainly, Congress couldn't have intended in this case to bind the District Court into a technical, as well as inflexible set of rules concerning the

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*Presently, there are ten outstanding indictments from that grand jury which involve the FHA-VA investigation and which are still subject to a Rule 12 motion to dismiss. In three of them (*United States* v. *Roth, et al.*, [73 Cr. 761]; *United States* v. *Weinerman* [73 Cr. 414], and *United States* v. *Rothenberg* [73 Cr. 837]), the defendants have moved before Judge Bartels for the same relief as the appellee herein. Judge Bartels has withheld decision pending this Court's determination herein. In another indictment from that grand jury (*United States* v. *Kleen Laundry and Cleaners, Inc., et al.* [73 Cr. 843]), Judge Weinstein has reserved decision on a similar motion and adjourned the trial until September, 1974, in part to await a decision by the Court herein.

** The body of the order which directed the impanelment of that March 20, 1972 grand jury mistakenly speaks of the convening date as "March 20, 1971."

convening or extension of grand juries. At the very least, in the interplay between Rule 6(g) and Section 3331, Congress did not intend to legislate as to the validity of indictments under the circumstances herein.

The circumstances brought to Chief Judge Mishler's attention when he signed the August 30th order extending the grand jury's term for an additional six months were compelling. The March, 1971 special grand jury quickly became a grand jury investigating organized criminal activity even though it was not so named. Necessity required its extension and the United States Attorney's Office as well as the District Court acted upon that necessity. In no way has appellee been prejudiced by that extension. The indictment herein, whether viewed as the product of a properly extended grand jury or of a *de facto* grand jury in the narrowest sense, that is, sitting under color of right, stands as valid. To hold otherwise, in the words of Justice Frankfurter, "is to make of the grand jury a pawn in a technical game instead of respecting it as a great historic instrument of lay inquiry to criminal wrongdoing."

CONCLUSION

The order of the District Court dismissing the indictment should be reversed and the indictment ordered reinstated.

Respectfully submitted,

April 29, 1974

EDWARD JOHN BOYD, V,
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Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 29th day of April, 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLANT and APPENDIX of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Victor Rabinowitz, Esq.
30 East 42nd Street
New York, N. Y. 10017

Sworn to before me this
29th day of April 1974

Irene B. Cohen

IRENE B. COHEN
Notary Public, State of New York
No. 24-0[illegible]
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

Deborah J. Amundsen
DEBORAH J. AMUNDSEN

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:

_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____ _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:

_____
_____
_____
Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COU
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within ___
_____is hereby admitted.
Dated: _____, 1

_____
Attorney for _____

FPI-LC-5M-8-73-7355